CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4590

Heard in Montreal, October 12, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 14-day suspension, and 30-day suspension of Conductor M. Tilford.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

14-Day Suspension

Following an investigation, on March 29, 2016 Conductor Tilford was assessed a 14-day suspension as shown on his Employee Notification Letter as follows, "Please be advised that you have been assessed with 14 days of suspension for the following reason(s): For failing E-test CRT-11 and CRT14A, of the Train & Engine Safety Rule on February 14, 2016."

The Union's position is that a 14-day suspension in this matter is excessive in all circumstances. The Union further believes this investigation was not held in a fair and impartial manner as shown by the information provided within the investigation and the grievances as 2 Trainmasters provided memos prior to the investigation and when questioned during the investigation their stories changed. Further the Union as noted within the investigation Mr. Tilford had on big Winter mitts, how could the Trainmaster in fact see his fingers, he saw the excess mitt. Mr. Tilford was continually put unwarranted scrutiny as shown within the grievances. The Union requests that the suspension be removed and Conductor Tilford be made whole for his lost earnings/benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

30-Day Suspension

Following an investigation, on March 29, 2016 Conductor Tilford was assessed a 14-day suspension as shown on his Employee Notification Letter as follows, "Please be advised that you have been assessed with 30 days of suspension for the following reason(s): For violation of CROR General Notice, General Rule A(i), A(iii), A(vi), CROR 106, CROR X13 and GOI Section 7 item 15.1; resulting with a passed knuckle and derailing L1-2 on DTTX 725010 while working as a Conductor on February 19, 2016. Suspension is from March 15 until April 13, 2016. Back on April 14th, 2016."

The Union's position is that a 30-day suspension in this matter is excessive in all circumstances. The Union further believes this investigation was not held in a fair and impartial

manner as the Company did not have the Locomotive Engineer part of the investigation process. The Company states that Mr. Tilford could have requested witnesses but the normal process where a "crew' is involved in an incident the crew is investigated, Mr. Tilford believed sometime after the Locomotive Engineer would be asked questions which did not happen. It is clear the Company had put full blame on Mr. Tilford prior to any investigation. The Union does not argue a derailment took place but request the mitigating factors presented at the statement be taken into consideration. The Union requests that the suspension be removed and Conductor Tilford be made whole for his lost earnings/benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) W. Apsey **(SGD.)**
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Guerin	– Senior Director, Labour Relations, Calgary
C. Gilbert	– Manager, Labour Relations, Montreal
E. Routhier	– Labour Relations Intern, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
D. Psichogios	– Vice General Chairman, Montreal
M. Tilford	– Grievor, Smiths Falls

AWARD OF THE ARBITRATOR

Nature of the Case

1. The TCRC has grieved two separate incidents where CP imposed a 14-day suspension (entraining/detraining) and a 30-day suspension (derailment) for Conductor Mark Tilford.

2. For the reasons which follow, the arbitrator has concluded that, while CP had grounds to issue discipline, the measures imposed on Mr. Tilford were excessive given all the circumstances. The arbitrator has accordingly reduced the discipline.

14-day Suspension

3. CP suspended Mr. Tilford for 14 days for two reasons: i) his failure to properly entrain and detrain equipment and ii) for improperly applying handbrakes. The TCRC argued CP's investigation rendered the discipline null and void, based on alleged differences between written statements and two trainmasters' oral comments.

4. The arbitrator has decided to dismiss this procedural objection for two reasons.

5. First, the arguments made go to the merits of CP's decision to impose discipline. Evidence is rarely uniform, but that reality differs from demonstrating that an investigation was unfair and partial.

6. Second, the arbitrator did not find an objection, and its specific grounds, in either the investigation transcript or in the TCRC's May 18, 2016 grievance (Union Exhibits: Tabs 6 and 8, U-3). The TCRC did allude to an unfair investigation in its June 17, 2016 step 2 grievance, though even there its short summation contested the quality of CP's evidence.

7. TCRC has not persuaded the arbitrator that CP's investigation rendered the discipline null and void. During the investigation, Mr. Tilford expressed certain concerns in his defence arising from the trainmasters' comments, as he is fully entitled to do. His comments went to the weight of CP's evidence, but did not support a procedural objection based on a lack of fairness and impartiality.

8. Based on the evidence, CP has not convinced the arbitrator that Mr. Tilford had placed his fingers inside the rim of the handbrake when he applied it. The event occurred on a cold winter day and Mr. Tilford had large mitts on his hands. Similarly, the witnesses were a significant distance away.

9. CP has satisfied the arbitrator of the importance of using the proper foot when entraining/detraining. During the investigation, Mr. Tilford indicated he understood the importance of using the correct foot so that in the case of failure he would fall away from the movement.

10. CP noted this error when conducting an efficiency test, but also confirmed that Mr. Tilford performed the manoeuvre correctly just a short time later.

11. In the circumstances, the arbitrator substitutes a written warning for the 14-day suspension. Safety is crucial for everyone in the railway industry, but Mr. Tilford's momentary lapse did not warrant the suspension CP imposed.

30-day Suspension

12. CP suspended Mr. Tilford for 30 days for an incident resulting in a derailment. The TCRC argued CP's investigation rendered Mr. Tilford's discipline null and void, since the other crew member, the locomotive engineer, was neither questioned nor disciplined.

13. This Office has frequently commented on investigations, in part because they are so crucial to CROA's expedited arbitration process. The investigation provides the factual underpinning for every CROA case. Section 70 of the parties' collective agreement sets out their rights and obligations during investigations.

14. In CROA&DR 2073, Arbitrator Picher emphasized that, while investigations must remain informal and expedited, they still must generally provide an opportunity "to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence".

15. An employee's comments and conduct during an investigation may constitute an important factor when an arbitrator considers whether to intervene and reduce any discipline imposed: CROA&DR 4549. Mr. Tilford's candour in the instant case was a mitigating factor.

16. The transcript from the investigation (Union Brief: U-3, Tab 2) indicates that CP provided Mr. Tilford and his representative with an opportunity to explain what transpired (QA9). The transcript does not appear to suggest that the engineer, who was following Mr. Tilford's instructions, was to blame, in whole or in part. CP's March 2, 2016 letter convening the interview referred to article 70(3) of the collective agreement which allows employees being investigated to call witnesses "on their own behalf".

17. There was no objection raised during the investigation about the fairness of the process.

18. The purpose of bringing a particularized objection to the other party's attention is to provide an opportunity for any alleged procedural deficiencies to be corrected. This is particularly important in an investigative process which is designed to be more informal and expedited, as compared with a formal hearing before an administrative tribunal.

19. This Office has found that an objection to a defective hearing notice, which was not raised during the investigation, or at the grievance level, can give rise to waiver: CROA&DR 3610. In CROA&DR 3610, Arbitrator Picher commented:

> The Union forfeited the opportunity to protest the lack of notice under article 24.2 when the grievor agreed, right at the beginning of the investigation, without any objection from his Union representative, that the hearing could proceed. Ms. Barwell's comment that the record could "speak for itself" at the end of the investigation was insufficient to put the Company on notice that the Union objected to the hearing taking place because of a lack of written notice of the investigation. Further, if there was any real concern on the part of the Union over the lack of notice, the Company would have been notified when the Step 3 grievance was filed on February 28, 2006. There is no concern expressed in the Step 3 grievance over any procedural irregularities, including any breach of the notice requirements set out under article 24.2. It is simply too late for the Union to raise this kind of procedural objection at arbitration having not raised it in a timely fashion at either the investigation or when the grievance was filed. The Union's objection that the January 3, 2006 discipline should be declared void ab initio is therefore rejected.

20. The issue in the instant case does not concern whether a hearing notice respected the collective agreement's requirements. Instead, the TCRC argues that the failure to

investigate the locomotive engineer renders the discipline null and void. While the arbitrator could not find any such objection in the interview transcript, the TCRC did raise this objection at the grievance level (Union Brief: U-3, Tab 9).

21. The TCRC referred to CROA&DR 3998 and Arbitrator Picher's comments about only one member of a crew being investigated following an incident:

> Secondly, and of equal importance, is the troubling fact that there appears to have been no disciplinary attention paid to any of the other members of the grievor's crew. His conductor, who bore greater responsibility for the overall operation and who was in radio contact with the grievor at all material times, must be taken to have been equally responsible to the extent that he plainly did not hear any command from the grievor to the locomotive engineer instructing him to stretch the movement to verify the coupling. The same can be said of the locomotive engineer. It is unclear to the Arbitrator on what basis the Company decided to neither investigate nor assess any discipline against any of the other members of the grievor's crew who were equally responsible for the coupling operations being performed at that time.

22. The arbitrator has not been persuaded that discipline will always be void *ab initio* if all members of a crew are not interviewed following every incident. Rather, it is the evidence arising from the investigation which will determine when this result might follow.

23. The arbitrator has decided to dismiss TCRC's procedural objection for the following reasons. The TCRC is correct that Mr. Tilford does not bear the burden of proof. However, the parties have negotiated specific language which allows someone like Mr. Tilford to have witnesses present. Such witnesses may persuade the employer not to proceed with discipline or to conduct a supplementary investigation.

24. Given the importance of providing a particularized objection, if Mr. Tilford felt someone else was to blame, in whole or in part, then he had the opportunity to raise it during the investigation.

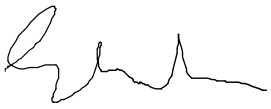
25. The investigation transcript did not demonstrate to the arbitrator why the locomotive engineer's own conduct required his involvement in the process, failing which the investigation would be unfair and partial. The situation in CROA&DR 3998 was different, since Arbitrator Picher had evidence with which to conclude that the employee who was not interviewed bore greater responsibility for the operation. In addition, Arbitrator Picher's decision suggested the evidence showed that the other employee(s) had failed to hear certain instructions which contributed to the incident.

26. The current situation was not one where the investigation transcript suggested two employees demonstrably shared fault, but the employer, without apparent justification, investigated and disciplined only one of them. The focus has to be on the evidence when evaluating this type of procedural objection.

27. On the merits of the discipline imposed, the TCRC has persuaded the arbitrator that the 30-day suspension should be reduced. The incident involved a rule violation and resulted in a derailment. Mr. Tilford, hired on July 20, 1998, is a long service employee. His investigation transcript demonstrates his candour in explaining what he believed led to the derailment. He did not attempt to deny responsibility or shift blame.

28. In these circumstances, the arbitrator substitutes a 7-day suspension for the original 30-day suspension.

29. The arbitrator orders that Mr. Tilford's record be changed to reflect the reduced discipline. The arbitrator further retains jurisdiction regarding the appropriate compensation owing to Mr. Tilford, especially since the suspensions were described as concurrent.



November 1, 2017

GRAHAM J. CLARKE
ARBITRATOR